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AUG 31 2009

King County Superior
Appellate Unit

NO. 63266-3-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JESUS SILVA,

Appellant.

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COURT OF APPEALS
DIVISION ONE

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Deborah Fleck, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motions for mistrial based on the improper admission of evidence that appellant previously had engaged in repeated and serious misconduct.

Issue Pertaining to Assignment of Error

Although the trial court had precluded evidence of appellant's prior bad acts, jurors learned that appellant had previously been incarcerated on another matter, had a history of aggression, had taken and hidden his children from their mother, and had threatened consequences if he went to prison on the current charges. This evidence improperly focused jurors on appellant's propensity for misconduct, thereby making it more likely jurors would convict him on the current charges. Did the trial court err when it denied appellant's motions for mistrial?

B. STATEMENT OF THE CASE

1. Substantive Facts

The King County Prosecutor's Office charged Jesus Silva with four criminal offenses: (count 1) Unlawful Imprisonment – Domestic Violence; (count 2) Robbery in the Second Degree – Domestic Violence; (count 3) Assault in the Fourth Degree – Domestic Violence; and (count 4) Assault in the Fourth Degree – Domestic

Violence. CP 13-14.

The charges stemmed from events in July 2008 involving Silva and his longtime girlfriend, Elvia Mejia. CP 13-14; 2RP¹ 33. Silva and Mejia met in 2001 and have two young children. 2RP 33. Over the years, they had multiple breakups and reconciliations. 2RP 35-38, 52-55.

The status of the couple's relationship in July 2008 is not clear. Initially, Mejia testified that the two were still dating but things were "not good" between them. 2RP 56. Later, however, she testified that they had already been split up for three months by July 2008. 3RP 8. But the two continued to live together in Auburn, with their children, in the home of Silva's sister – Sylvia. 2RP 55-56.

According to Mejia, several days prior to July 10, the family began staying with Silva's aunt – Antonia – who lives in Kent. 2RP 38; 3RP 9-10. Mejia testified that she did not want to be there, but Silva forced her and would not allow her to leave the home. He also accused her of wanting to be with other men. 3RP 9-12.

According to Mejia, on July 10 – while Antonia and the

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 9, 2009; 2RP – February 10, 2009; 3RP – February 11, 2009; 4RP – February 12, 2009; 5RP – March 6, 2009.

children were inside Antonia's home and without even a chance to speak with them – Silva forced her into his car through intimidation and told her they were going to Yakima to run an errand. 3RP 12-16. She repeatedly indicated she did not want to go. Once on the highway, she attempted to open the car door, but Silva prevented her from doing so by locking all the doors. 3RP 16-18.

According to Mejia, Silva was yelling at her and she was crying. 3RP 18. At one point, he grabbed her purse from her, removed about \$400.00, and threw the purse and its remaining contents out the car window. 3RP 18-19, 22-24. Silva also hit her in the face with his closed fist. 3RP 19-21. He then hit her a second time, splitting her lip and causing her to bleed. 3RP 25-26. At a rest area, Silva gave her a new shirt and cleaned the blood from the interior of the car. 3RP 26-27.

At trial, Silva disputed most of Mejia's testimony concerning the drive to Yakima. According to Silva, he and Mejia lived apart for a period in 2008. During part of that time, he lived with a female friend – Anna – in Yakima. But he and Mejia were still a couple during this time. 3RP 91-93. They and the children moved back in together, in Silva's aunt's house, in early July. 3RP 92, 94. Contrary

to Mejia's testimony, Silva testified that Mejia never complained or indicated she did not want to be there and no one forced her to be there. She came and went as she pleased on a daily basis. 3RP 94-95.

On July 10, Silva decided to drive to Yakima to collect money that his friend Anna owed him. 3RP 96. He invited Mejia to come with him to alleviate any concerns she had about his relationship with Anna, and Mejia indicated she wanted to go. 3RP 96-98. They left the children with Antonia and departed in the afternoon. 3RP 97.

During the drive, the two talked about getting a motel room and spending the night in Yakima. But when Silva suggested that Mejia could wait at the motel while he met Anna, the two began to argue. 3RP 98. According to Silva, Mejia became very angry, said she would rather they both die than see him with another woman, and grabbed the steering wheel of the car while they were traveling at about 70 miles per hour. 3RP 99. Silva reacted by striking Mejia with the back of his closed fist. He did not intend to split her lip. He only intended to maintain control of the car. 3RP 100-101, 112-114.

The couple stopped at the rest stop, where he gave Mejia a clean shirt and cleaned the blood from the car. 3RP 101-102, 108-109. Mejia was upset and stopped talking to Silva for the remainder

of the trip. 3RP 101-102. Silva denied hitting Mejia a second time and denied taking money from her purse. 3RP 103-105, 112.

Once Silva and Mejia arrived in Yakima, they pulled in to a motel parking lot, and Mejia called police from the motel office. 3RP 27-28, 48, 102-103; exhibit 6. Silva tried to persuade Mejia not to make the call, but she told him to go away. He left the motel in his car and drove to Anna's home, where he collected the money she owed him. 3RP 48, 103. He and Anna then went to a local club. 3RP 104.

Yakima police responded to the motel and took Mejia to a shelter. 3RP 64-66. Her lip was stitched at a local hospital and she called Silva's sister, Sylvia, who drove down to Yakima, picked her up, and drove her back to Auburn. 3RP 30-34. As they left town, Mejia spotted Silva's car in the club parking lot and called police again. 3RP 31. Police arrested Silva at the club. 3RP 104. He had \$393.00 in cash. 3RP 67-68.

Both Silva's aunt (Antonia) and his sister (Sylvia) testified at trial. And both supported Silva's version of events. Contrary to Mejia's testimony that she had been forced to stay at Antonia's home in July 2008, Antonia testified that the couple seemed happy while in her home. 3RP 73. Mejia never complained and frequently came

and went on her own. 3RP 73-74. Moreover, contrary to Mejia's claim that she had been forced without any prior warning to go to Yakima, Antonia testified that Mejia told her they were going to Yakima and planned to leave the kids with her. She seemed quite happy. 3RP 74-75.

Sylvia testified that on the drive back to the Seattle area from Yakima, Mejia talked about what had happened when she was in the car with Silva. She admitted she had tried to grab the steering wheel and Silva accidentally struck her while thwarting her effort. 3RP 84. When asked about this at trial, Mejia denied making the statement or grabbing the wheel. 3RP 43.

2. Bad Acts Evidence

The State stipulated it would not introduce at trial any evidence of prior bad acts involving Silva. 1RP 13, 18; CP 7-9; Supp. CP ____ (sub no. 53C, State's Trial Memorandum, at 7). Unfortunately, Mejia repeatedly violated this agreement.

The first violation occurred on direct examination. Mejia testified that for a period during her relationship with Silva, she had lived in Mexico. 2RP 37. The deputy prosecutor asked Mejia where Silva lived when Mejia was in Mexico and she responded, "He was in jail." 2RP 39. Defense counsel moved for a mistrial. 2RP 40-41,

47-48. The motion was denied and the court instructed jurors to disregard the testimony. 2RP 45-52.

Later on direct, the prosecutor asked Mejia to clarify what she meant when she testified that her relationship with Silva was not good in July 2008. Mejia responded by indicating that Silva was “aggressive.” 3RP 7-8. Defense counsel objected and, after a sidebar, the prosecutor moved on. 3RP 8. Mejia used this same description of Silva – that he was “aggressive” – to explain why she had not tried to leave the house in the days leading up to July 10. A defense objection was overruled. 3RP 11.

There were additional violations during the State’s redirect of Mejia. While asking Mejia why, shortly before she and Silva left for Yakima on July 10, she had been standing outside Antonia’s house with her purse if she did not know in advance they were leaving for Yakima, the following exchange took place with the prosecutor:

Q: Ms. Mejia, why is it that you had your purse with you when you were outside that day before the defendant came outside?

A: Because I had once tried to leave, and –

[Defense Counsel]: Objection, Your Honor.

A: There were times that I had gone, and he had tried to –

THE COURT: Overruled

A: take away the children. And he had already done that once in a occasion, and he had hidden them in Mexico.

3RP 47. Defense counsel asked for a sidebar and the court then instructed jurors to disregard Mejia's answer. 3RP 47-48.

After a few additional questions, the following exchange occurred:

Q: Okay. Ms. Mejia, I just have one more question. How do you feel about the defendant now?

3RP 48. Defense counsel objected on relevance grounds and, after a sidebar conference, the court overruled the objection. 3RP 48-49.

The prosecutor then continued:

Q: Ms. Mejia, I believe I asked you just right before that break how you feel about the defendant now.

A: That I don't love him, that I am afraid when he gets out because on one occasion he told me that he –

3RP 49. At this point, the court interrupted and asked that the jury be escorted out of the courtroom. 3RP 49. Outside the jury's presence, Mejia indicated she was about to finish her sentence by explaining that Silva said he knew where her family lived in Mexico and something would happen to them if he went to jail. 3RP 49.

Defense counsel renewed her motion for mistrial, based on the cumulative impact of this testimony and the various other statements Mejia had made concerning Silva's past transgressions. 3RP 51. The motion was denied and the court instructed jurors not to consider anything Mejia said after she stated she no longer loved Silva. 3RP 51-52.

Jurors acquitted Mejia of Unlawful Imprisonment and Robbery, although they found him guilty of the lesser-included offense of Theft in the First Degree. They also acquitted on one count of Assault 4, but convicted on the other. CP 41-45. He was sentenced to one year in jail and timely filed his Notice of Appeal. CP 50, 54, 57.

C. ARGUMENT

EVIDENCE THAT SILVA HAD PREVIOUSLY BEEN IN JAIL, HAD A HISTORY OF AGGRESSION, HAD HIDDEN HIS CHILDREN FROM THEIR MOTHER IN MEXICO, AND THREATENED MEJIA IN A MANNER THAT MADE HER FEAR HIS RELEASE FROM PRISON DENIED HIM A FAIR TRIAL.

Mejia provided multiple answers alerting jurors to Silva's past misconduct. As noted above, the first occurred when Mejia told jurors that Silva had previously spent time in jail. 2RP 39. The second occurred when Mejia twice used the term "aggressive" when

describing Silva prior to July 10, 2008. 3RP 7-8, 11. The third occurred when Mejia told jurors that Silva had attempted to take the children in the past and once hid them in Mexico. 3RP 47. And the fourth occurred when Mejia indicated that based on something Silva had told her, she feared his release from prison. 3RP 49.

In determining whether a trial irregularity requires a mistrial, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, these errors were very serious. Recognizing the inherent prejudice that would result from jurors learning about Silva's past misdeeds, the State stipulated it would not make use of this information at trial and the deputy prosecutor instructed Mejia not to mention it. 1RP 13, 18; 2RP 49. But she did mention it. And now jurors knew Silva had been incarcerated, he had a history of aggression toward her, he had gone so far as to steal the children and hide them from their mother, and he had threatened

consequences if he went to prison on the current charges.

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference" State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also ER 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). And this was the effect in Silva's case. It shifted jurors' attention to his propensity for criminality and away from the evidence and relevant issues in this case.

Looking at the second factor – whether the evidence was cumulative – it was not. The trial court had excluded evidence of prior misconduct.

Third, there were no curative instructions when Mejia twice described Silva as "aggressive." See 3RP 7-8, 11. There were curative instructions for the other violations. See 2RP 52 (telling jurors to disregard fact Silva was in jail and noting it did not mean he had been convicted of a crime); 3RP 48, 52 (telling jurors to disregard fact Silva hid kids in Mexico and that Mejia fears his

release from prison based on something he told her). But some errors simply cannot be fixed with an instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56. One reference might have gone unnoticed or been cured by an instruction, but not multiple references. Jurors would have been unable to put the evidence out of their minds.

In denying defense counsel's motions for mistrial, the court relied heavily on State v. Condon, 72 Wn. App. 638, 865 P.2d 521, review denied, 123 Wn.2d 1031 (1994). 2RP 45-47 (citing Condon repeatedly); 3RP 51 (relying on "same analysis" as initial denial). But Condon is easily distinguished. Condon was tried for murdering his lover's husband. While testifying at trial, his lover mentioned that Condon had called her "when he was getting out of jail" and had asked her to pick him up from jail in Seattle. Condon, 72 Wn. App. at 648. The trial court denied a motion for mistrial and instructed jurors to disregard the two references to jail. Id.

On appeal, this Court noted cases in which reversal had been appropriate because the referenced prior misconduct was similar to that for which the defendant was on trial. Condon, 72 Wn. App. at 648-649 (citing Escalona, 49 Wn. App. 251 and State v. Wilburn, 51

Wn. App. 827, 755 P.2d 842 (1988)). But the references to jail in Condon's case were "much more ambiguous," could have indicated a minor offense, and certainly did not indicate a propensity to murder. Moreover, the evidence against Condon was very strong and included his confessions to other inmates. Therefore, a mistrial was not warranted and the court's curative instruction sufficed. *Id.* at 649-650.

In Silva's case, the question of his guilt was much closer. Jurors obviously took issue with portions of Mejia's story because they acquitted Silva on three of the charges. Indeed, Silva's sister and his aunt supported his version of events on critical facts (Mejia willingly accompanied Silva to Yakima and she was struck while attempting to take control of the steering wheel). Thus, unlike Condon, the improper evidence had the potential to sway jurors on those counts on which they convicted.

Moreover, unlike Condon, Silva's jury did not merely learn he had been in jail. They knew the couple had a tumultuous relationship and history of breaking up, making it more likely Silva's stint in jail had something to do with Mejia. They also learned that he had been aggressive with Mejia on other occasions, had taken and hidden the children from her, and had made her fearful for the day

he was released from prison. In combination, this evidence portrays an individual who is cruel and dangerous and therefore more likely to steal from his girlfriend and intentionally strike her in the face.

In the absence of these serious trial irregularities, Silva had a good chance of outright acquittal on all of the charges. The court's curative instructions were insufficient to restore that opportunity.

D. CONCLUSION

Cumulatively, the improper evidence denied Silva a fair trial.

DATED this 28th day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63266-3-I
)	
JESUS SILVA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JESUS SILVA
NO. 37007-177
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FORT WORTH, TX 76119

2009 AUG 31 PM 4:25
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2009.

x Patrick Mayovsky